

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

<b>DUSTIN ISENHART, <i>et al.</i></b>	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 16-cv-193 SMY/PMF
	)	
<b>NRT TECHNOLOGY CORP., <i>et al.</i></b>	)	
	)	
Defendants.	)	

**PLAINTIFF’S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT  
WITH INCORPORATED MEMORANDUM OF LAW IN SUPPORT**

COMES NOW Plaintiff, Dustin Isenhardt (“Plaintiff”), by and through his attorneys, and moves for leave to file an amended Complaint. In support thereof, he states as follows:

1. On March 7, 2016, NRT Technology Corp. and Tropicana Entertainment, Inc., hereinafter “Defendants”, were served with the Complaint in the above-captioned case. Dfts’ Unopposed Motion for Enlargement of Time, ¶ 3.

2. On March 23, 2016, Defendants asked for an extension of time up to April 27, 2016 so that they could properly respond. In good faith and in the interest of cooperation, Plaintiff agreed to the extension. Dfts’ Unopposed Motion for Enlargement of Time, ¶¶ 4-5.

3. On April 27, 2016, instead of filing an answer to the Complaint, Defendants filed a motion to dismiss this action or alternatively stay proceedings because Defendants insist that a United States Supreme Court case might disturb these proceedings by impacting the availability of statutory damages for Plaintiffs under FACTA.

4. Plaintiff desires to file the amended Complaint attached hereto in order to address the concerns raised by Defendants in their motions. Among other important changes, this amendment clarifies the facts so that it is crystal clear that this Court may exercise personal

jurisdiction over both Defendants, that venue is proper in this District, and that Defendant Tropicana Entertainment, Inc. is liable under FACTA for the illegal receipts that were issued by NRT's ATMs. In addition, the amended Complaint addresses Defendants' arguments over statutory damages by spelling out why Plaintiff and the Class members have been harmed even in the absence of identity theft. Finally, this amended Complaint provides an alternative remedy for Plaintiffs should the Supreme Court rule in way that impacts the availability of statutory damages by adding the following to the prayer for relief:

“In the alternative, only if statutory damages under FACTA are determined to be invalid, illegal, unenforceable or otherwise ineffective for Plaintiff and the Class members under the facts as presented in this Complaint, Plaintiffs request actual damages, which may be determined on a class level by means of expert testimony.”

5. Plaintiffs would be allowed to proceed in this fashion under FACTA because a Plaintiff may request statutory “or” actual damages. *Tremble v. Town & Country Credit Corp.*, No. 05 C 2625, 2006 WL 163140, at \*3 (N.D. Ill. Jan. 18, 2006) (FACTA “unambiguously allows recovery of any actual damages sustained *or* damages of not less than \$100 or more than \$1000. The provision is worded in the disjunctive; “or” means or.”). By pleading this alternative form of relief in the event that Plaintiffs’ preferred statutory damages option becomes untenable, Plaintiffs have eliminated the perceived need to stay these proceedings.

6. Under applicable federal law regarding amendment of pleadings, Plaintiffs should be allowed to amend their Complaint because “[t]he Federal Rules respecting amendments to pleadings should be given a liberal construction so that cases are decided on the merits rather than on bare pleadings.” *Tarvin v. Bd. of Educ. of E. St. Louis Sch. Dist. No. 189*, No. CIV.09-655-GPM, 2010 WL 2348612, at \*1 (S.D. Ill. June 10, 2010); see also *Aliano v. Amerigas Partners, L.P.*, No. 07 C 4110, 2008 WL 4671716, at \*2 (N.D. Ill. Oct. 22, 2008) (granting leave for the plaintiff to amend his complaint more than a year after the suit was filed to alternatively

plead actual damages under FACTA instead of statutory damages because statutory damages were eliminated as an option).

7. This case was filed less than three months ago. Even though Defendants were granted an extension of time to answer, no answer has been filed in this case, neither party has started discovery, no party has moved for summary judgment, and this case is not set for trial.

8. Given that this case is still in its infancy, Defendants are not prejudiced by the proposed amendment. By granting this motion to amend the Complaint, this Court will merely allow this case to proceed on the merits.

**WHEREFORE**, Plaintiff prays that this Court grant his motion for leave to file the amended Complaint attached hereto and grant such other and further relief as this Court deems just and proper.

Dated: May 11, 2016

Respectfully submitted,

**HOLLAND LAW FIRM**

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**CERTIFICATE OF SERVICE**

I hereby certify that, on May 11, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this action.

s/R. Seth Crompton